No. 89-385

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

JOE L. BARR, A/K/A JOSEPH L. BARR,
Petitioner,
v.
UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER JOE L. BARR, A/K/A JOSEPH L. BARR

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ISSUES PRESENTED FOR REPLY

I. Whether contrary to the assertion of the union, and the opinion of the Second Circuit, a union owes an affirmative duty to its members to process a meritorious grievance with some minimal degree of care and competence.

II. Whether this case presents an appropriate opportunity for the court to resolve the conflict among the circuits.

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REPLY ARGUMENTS

In its Brief in Opposition, Respondent Local 804 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union herein) has raised several arguments which merit reply. The facts of this case are set out in the Petition for Writ of Certiorari.

I. CONTRARY TO THE ASSERTION OF THE UNION, AND THE OPINION OF THE SECOND CIRCUIT, A UNION OWES AN AFFIRMATIVE DUTY TO ITS MEMBERS TO PROCESS A MERITORIOUS GRIEVANCE WITH SOME MINIMAL DEGREE OF CARE AND COMPETENCE.

In its effort to bring the opinion of the Second Circuit in the case at bar within the parameters of Supreme Court precedent, the Union seeks to dilute the duty of fair representation, as articulated by this Court, to the point of meaninglessness. The Union states that "[t]he concept of fairness and honesty *does not imply a duty to supply a particular degree of care or competence*" (Union's Brief in Opposition at 14 (emphasis added)). The Union further states that "[t]he court of appeals faithfully adhered to th[is] principle[]" in reaching its decision (*Id.* at 15).

It is clear from this passage of the Union's brief that the Union views the decision of the Second Circuit in this case as presenting a formidable obstacle to union liability in a hybrid suit under § 301 of the Labor Management Relations Act. Therefore, the Union's interest in having this decision stand goes far beyond the facts of the present case. In this respect, the Union is certainly correct, because the decision of the Second Circuit, if allowed to stand, will virtually eliminate any affirmative duty on the part of the Union to perform its representative function within any objectively acceptable standard. The effect of the Second Circuit's analysis would be to insulate unions from liability unless a plaintiff is able to offer direct proof of the union's subjective bad faith.

Although the Union correctly indicates that the standard applied by the Second Circuit requires no "particular degree of care or competence," the Union's characterization of the duty of fair representation, as articulated

by this Court, is fundamentally flawed. In *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), this Court held that, in addition to the proscription against arbitrary conduct, a union has an affirmative duty "to exercise its discretion with complete good faith and honesty." *Id.* at 177.

This affirmative duty was further clarified in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). In that case, the Court distinguished *Humphrey v. Moore*, 375 U.S. 335 (1964), where it was found that the union had not breached its duty of fair representation, stating that in *Humphrey*, the arbitral "decision was held binding on the complaining employees only after we determined that the union *had not been guilty of malfeasance and that its conduct was within the range of acceptable performance by a collective-bargaining agent*[.]" *Hines v. Anchor Motor Freight, Inc., supra*, 424 U.S. at 568 (emphasis added). The Court concluded that Congress's encouragement of private dispute settlement arrangements contained in collective bargaining agreements "anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Id.* at 571.

Although a union is allowed a "wide range of reasonableness" in fulfilling its duty of fair representation, *Humphrey v. Moore, supra*, 375 U.S. at 349, it is clear from the cases cited above that the range of acceptable union performance has some objective limits. Under the standard advanced by the Second Circuit and the Union in the case at bar, however, a union's performance, no matter how objectively unacceptable, cannot form the basis of a breach of its duty of fair representation if the union asserts that it was motivated by tactical considerations. Thus, a union is insulated from liability for its failure to investigate a grievance, its failure to call critical exculpatory witnesses, and its failure to prepare for arbitration.

It is clear from the Second Circuit's opinion that even if evidence is proffered casting doubt on the validity of the union's assertion that its actions were tactical in nature, the court would not allow the jury to resolve the conflicting evidence. In the case at bar, the jury was properly instructed that acts of "carelessness, inadvertence, negligence or ordinary errors of judgment in deciding how best to handle a grievance or arbitration" do not rise to the level of arbitrary or perfunctory conduct sufficient to form the basis of a breach of the union's duty of fair representation (Joint Appendix at 1306).

Although the Union asserted that its failure to develop a defense or to call critical exculpatory witnesses was motivated by tactical considerations, the Petitioner argued that this explanation was merely pretextual, pointing to the conflicting justifications offered over the years by the union. The jury apparently found, as the Petitioner argued, that the Union's explanation that its actions were motivated by tactical considerations was unworthy of credence. Giving no deference to the verdict in the district court, the court of appeals held that, "[n]one of the evidence adduced at trial concerning Barr's allegations of specific failings of Local 804 detracts from our conclusion that any errors Local 804 might have made were of a tactical nature." *Barr v. United Parcel Service*, 868 F.2d 36, 44 (2d Cir. 1989). [1]

The court of appeals accepted at face value the Union's assertion that its actions were motivated by tactical considerations, ignoring the conflicting explanations given

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[1]It is significant to note that the court of appeals came to an independent factual conclusion on this issue. Although the court purported to apply a standard under which the verdict would be upheld if supported by the evidence, the court, instead, reached its own conclusions and inquired if they were not *negated* by the evidence.

by the Union over the years. Furthermore, once it had accepted that the Union's actions were motivated by tactical considerations, the court of appeals made no effort to ascertain whether the Union's conduct was within the range of acceptable performance. *Hines v. Anchor Motor Freight, supra.*

Had the court of appeals examined the record in the light most favorable to the Petitioner, as it was required to do, the court would have seen an abundance of evidence supporting the jury's verdict that the Union put forth only a token effort on the Petitioner's behalf. The Union's conduct had the appearance, but not the substance, of representation. Had the court of appeals applied a standard which required *any degree of care or competence,* albeit a minimal one, the court would have found that there was sufficient evidence to support the jury's verdict that the Union processed the Petitioner's grievance in a perfunctory manner. The jury was properly charged, and rationally evaluated the evidence in light of the charge that was given. Therefore, under the proper standard for review on ruling on a motion for judgment notwithstanding the verdict, the court of appeals should not have disturbed the jury's verdict.

II. THIS CASE PRESENTS AN APPROPRIATE OPPORTUNITY FOR THE COURT TO RESOLVE THE CONFLICT AMONG THE CIRCUITS.

The Respondent raises the argument that "as there is no circuit in which, on the facts of this case, Barr could have prevailed, resolution of the alleged conflict among the circuits should await another day" (Union's Brief in Opposition at 20-21). The Respondent feebly attempts to explain away the divergence among the circuits by arguing

that the standards applied by the various courts are merely "isolated quotations from numerous circuit court opinions" (*Id.* at 16). It should be emphasized, however, that the Petitioner is not the first to remark on the disarray among the circuits on this issue. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988) ("The only thing that the federal courts seem to be in agreement on with respect to the duty of fair representation is that mere negligence is not a breach of this duty").

To find agreement among the circuits, the Respondent states the issue in absurdly generic terms: "whether the Union's conduct was arbitrary, discriminatory or in bad faith and, if so, whether it seriously undermined the arbitral process" (Union's Brief in Opposition at 17). The Petitioner acknowledges that there is general agreement on this point. The divergence relevant to the instant case, however, is evident in the varying definitions of *arbitrary or perfunctory* conduct. In the Eighth Circuit, for example, a union may be held liable for its perfunctory processing of a grievance if the union acts without concern or solicitude for the outcome. *Ethier v. United States Postal Service*, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979).

The Union is quite familiar with this standard, as it was adopted, notwithstanding the Union's objection by the district court judge in his jury instructions (Joint Appendix at 1306-07). Yet, while it sets out the standards from other circuits, the Union fails to acknowledge to this Court the Eighth Circuit's standard. It is clear, as the jury's verdict indicates, that under this standard the Petitioner could prevail. Furthermore, in contrast to the standard of the Second Circuit in the case at bar, the courts of other circuits require some minimal degree of care or competence on the part of a union. *See, e.g., Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1207 (11th Cir. 1982) (requiring "reckless disregard for the employee's rights" or con-

duct which is "grossly deficient"); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980) ("grossly deficient . . . conduct could be equated with arbitrary action"). Therefore, the Union's assertion that there is no circuit in which the Petitioner could have prevailed is erroneous.

CONCLUSION

For the foregoing reasons, and the reasons advanced in the Petition, the Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

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